Affiliated Foods, Inc. *and* United Food and Commercial Workers Local Union 548, AFL–CIO, CLC.
Case 16–CA–18695 (1–2)

August 4, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN AND HURTGEN

On March 11, 1998, Administrative Law Judge Keltner W. Locke issued the attached bench decision, supplemented by a written certification and Order dated April 13, 1998. The General Counsel filed exceptions and a supporting brief. The Charging Party also filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions, as modified below, and to adopt the recommended Order.

We affirm the judge's conclusion that the General Counsel has failed to prove by a preponderance of the evidence that the Respondent violated Section 8(a)(3) and (1) by terminating employees Ronald Hunt, John Weeks, and Alphonse Fred Buss.[2] We disagree, however, with the judge's finding that language about unions in the Respondent's employee handbook was not evidence of the Respondent's animus against unions and those who support them. The handbook described the Respondent as "a union-free organization" and expressed the view that "that a union would be of no advantage to any of us . . . (and) would hurt the business on which we all depend for our livelihoods." The Board has held that statements such as these, although alone not rising to the level of unfair labor practices, may still be used to show animus. E.g., *Lampi LLC*, 327 NLRB 222 (1998); *Gencorp*, 294 NLRB 717 fn. 1, 731 (1989).[3] The General Counsel has failed, however, to prove a nexus between the Respondent's union animus and the decisions to discharge the three employees. Even if we were to find that the General Counsel had met the threshold burden of proving antiunion motivation, we agree with the judge's further finding that the Respondent proved it would have discharged the three alleged discriminatees even in the absence of their protected union activities. We shall therefore adopt the recommendation to dismiss the 8(a)(3) allegations of the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Timothy Watson, Esq., for the General Counsel.
David Fielding, Esq. and *Frank Parker, Esq. (Fielding, Barrett & Taylor),* for the Respondent.
James L. Hicks Jr., Esq., for the Charging Party.

BENCH DECISION AND CERTIFICATION

STATEMENT OF THE CASE

KELTNER W. LOCKE, Administrative Law Judge. I heard this case on March 9 and 10, 1998, in Amarillo, Texas. On March 10, 1998, after all parties had rested, I heard oral argument,[1] and on March 11, 1998, issued a bench decision pursuant to Section 102.35(a)(1) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing this decision.[2] The Order is set forth below.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended[3]

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[1] The General Counsel and Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We note that the General Counsel did not allege that any of these employees engaged in protected concerted activity independent of their union activity or that the Respondent discharged them in violation of Sec. 8(a)(1) for such activity. Indeed, at the hearing, counsel for the General Counsel specifically disclaimed relying on such a theory with regard to Weeks and Buss.

[3] Contrary to his colleagues, Member Hurtgen does not find that the above-cited handbook provisions constitute evidence of animus such as to support a violation of Sec. 8(a)(3). In his dissenting position in *Wire Products Mfg. Corp.*, 326 NLRB 625, 630 (1998), Member Hurtgen found that where, as here, employers make statements that neither threaten nor promise, but merely express a preference that their employees remain unrepresented, those statements are not unlawful. Rather, they constitute expressions of free speech protected under Sec. 8(c). Applying the same rationale here, Member Hurtgen finds that such 8(c) statements similarly cannot be used to establish animus in support of an 8(a)(3) violation. In particular, Member Hurtgen relies on the statutory language of Sec. 8(c) which specifically provides that, where a statement comes within the protection of that provision, it "shall not constitute *or be evidence* of any unfair labor practice." [Emphasis added.]

[1] During oral argument, the General Counsel asserted that "you cannot rebut a General Counsel's case with hearsay evidence." (Tr. 504.) As announced in the bench decision, I found that the Government did not make a prima facie case.

I also concluded that Respondent did, in fact, establish that it would have discharged the three alleged discriminatees regardless of their protected activities. Based in part on reports which Respondent's management considered in making the discharge decision, Respondent had a reasonable, good faith belief that the three employees had engaged in the misconduct described in the evidence which the General Counsel would characterize as hearsay. However, such evidence is not hearsay on the issue of Respondent's motivation and it would not be necessary for Respondent to prove that the misconduct actually occurred to meet its burden on rebuttal. See, e.g., *GHR Energy Corp.*, 294 NLRB 1011, 1012–1013 (1989).

[2] I order the transcript corrected in accordance with Appendix B to this decision. [Omitted from publication. Corrections have been noted and corrected in Appendix A.]

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

ORDER

It is recommended that the complaint be dismissed in its entirety.

APPENDIX A

P R O C E E D I N G S

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JUDGE LOCKE: We'll go on the record now.

This is a bench decision in the case of Affiliated Foods, Incorporated, and United Food and Commercial Workers, Local Union 540, AFL–CIO–CLC, case number 16–CA–18695–1 and –2. It is issued pursuant to Section 102.35, Subparagraph (10), and Section 102.45 of the Board's rules and regulations.

Respondent has admitted in its answer the allegations raised in certain paragraphs of the General Counsel's complaint. Based upon those admissions and the record as a whole, I make the following findings of fact:

At hearing, the General Counsel orally amended paragraph 1(e) of the complaint to allege that the original charge in case 16–CA–18695–2 was filed by the Charging Party on June 23, and a copy was served upon Respondent by first class mail on the same date.

Also at hearing, Respondent stated that it does not contend that it has not received adequate notice of the charges in this case.

I find that the original charge in case 16–CA–18695–1 was filed by the Charging Party and served upon Respondent by first class mail on May 23, 1997; that the first amended charge in 16-CA-18695–1 was filed by Charging Party and served on Respondent by first class mail on June 3, 1997; that the second amended charge in case 16–CA–18695–1 was filed by Charging Party

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and served upon Respondent on June 13, 1997; that the third amended charge in case number 16–CA–18695–1 was filed by the Charging Party on June 17, 1997, and served upon the Respondent by first class mail on June 18, 1997;

That the original charge in 16–CA–18695–2 was filed by the Charging Party and served upon Respondent by first class mail on June 23, 1997; and that the first amended charge in case number 16–CA–18695–2 was filed by the Charging Party and served upon Respondent by first class mail on July 1, 1997.

Respondent has admitted facts establishing that it is an employer engaged in commerce within the meanings of Section 2(2), (6), and (7) of the Act. Specifically, Respondent has admitted and I find that at all times material to this case, it has been a Texas corporation, with a facility in Amarillo, Texas, and is engaged in the business of wholesale grocery distribution, as alleged in paragraph 2 of the complaint. I find that the General Counsel has proven the allegations in paragraph 2 of the complaint.

Respondent has admitted that during the 12 months before the complaint, which issued October 15, 1997, in performing the business operations described in paragraph 2 of the complaint, it purchased and received goods, services, and materials valued in excess of $50,000 directly from points located outside the state of Texas. Therefore, I find that the General Counsel has proven the allegations in paragraph 3 of the complaint.

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I also find that the General Counsel has proven the conclusion alleged in paragraph 4 of the complaint, that at all material times, Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Therefore, I find that the Respondent is subject to the jurisdiction of the National Labor Relations Board.

Respondent has admitted and I find that the Charging Party is a labor organization within the meaning of Section 2(5) of the Act. The Respondent has admitted and I find that the following individuals are its supervisors within the meaning of Section 2(11) of the Act and its agents within the meaning of Section 2(13) of the Act: the director of warehouse operations, Paul Siebenthal; the director of human resources, Don Barclay; the director of produce, who is also the assistant director of perishable operations, Harold Callaway; the employee relations manager, Kay Kropff; supervisor Joe Moore; and supervisor Barry Marcum.

The parties also stipulated at hearing that the director of transportation, Bobby Sutton, is a supervisor, and I so find.

The Respondent has also admitted the allegations in complaint paragraph 8 that on about June 20, 1997, it terminated the employment of employees John W. Weeks, Alphonse Fred Buss, and Ronald G. Hunt. I find that the General Counsel has proven the complaint allegations in paragraph 8.

The Respondent has denied the remaining allegations of the

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complaint, which I will summarize as follows.

Paragraph 7 of the complaint alleges that since about May 20, 1997, and on various dates thereafter, Respondent, by Paul Siebenthal, Harold Callaway, Joe Moore, and Barry Marcum, engaged in surveillance of and more closely supervised its employees because they supported the union.

Paragraph 10 of the complaint alleges that the conduct alleged in paragraph 7, that is, surveillance of employees and more close supervision of employees because they supported the union, violates Section 8(a)(1) of the Act.

Paragraph 10 of the complaint alleges that Respondent's discharge of employees Weeks, Buss, and Hunt, as alleged in complaint paragraph 8 and admitted by Respondent, violates Section 8(a)(1) of the Act, and that these unfair labor practices affect commerce within the meaning of 2, 6, and 7 of the Act.

Paragraph 11 of the complaint alleges that Respondent's discharge of employees Weeks, Buss, and Hunt violates Section 8(a)(3) of the Act, affecting commerce within the meaning of Section 2, 6, and 7 of the Act.

As noted, Respondent has denied these allegations. I make the following findings:

Affiliated Foods, Incorporated, which will be referred to as the Respondent or the Company, provides groceries and other merchandise on a wholesale basis to supermarkets, grocery and

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convenience stores which own shares in the company. Additionally, the Respondent makes sales to other institutions, large institutions which are not in the retail grocery business. These institutions do not own shares of the Respondent, and their accounts for a relatively small portion of the Respondent's revenues.

The retail store operators which do own shares of the Respondent elect its board of directors. These retail stores are

located in a wide area, as shown by the composition of the current board of directors. Its members operate businesses in Texas, Colorado, and New Mexico.

The Company operates a warehouse complex in Amarillo, Texas, and its drivers take merchandise from there to the various retail stores owned by their customers.

In about May 1997, United Food and Commercial Workers, Local Union 540, AFL–CIO, here referred to as the Charging Party or the Union, began trying to organize the employees at this warehouse complex, including the truck drivers. On May 19, 1997, the Union sent the Company a letter, listing the names of 20 employees who were members of the Union's in-plant organizing committee. These 20 include the three alleged discriminatees named in the complaint, Ronald Hunt, John Weeks, and Alphonse Fred Buss.

According to the complaint, on May 20, 1997, the day after the Union sent the Company the letter announcing its organizing

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drive and identifying its employee organizing committee, the Company began engaging in surveillance of and began more closely supervising its employees because they supported the Union.

Independent of the discharges of Hunt, Weeks, and Buss, which the complaint alleges to violate both Section 8(a)(3) and 8(a)(1) of the Act, this allegation of surveillance and stricter supervision is the only allegation that Respondent violated Section 8(a)(1).

In evaluating whether a statement or act interferes with, restrains and coerces employees in violation of Section 8(a)(1) of the Act, the Board applies an objective test. An employer's motivation for the statement or the act is irrelevant.

Similarly, whether or not a particular employee was actually coerced or considered himself to be is not relevant. Rather, the Board determines whether Section 8(a)(1) has been violated, based upon whether the statement or act in question reasonably would interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act.

Respondent adduced testimony that during this time period, it did increase supervision because management had received reports about instances of vandalism or potential vandalism. Transportation director Bobby Sutton testified that management had received reports of tampering with the thermostat settings

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on refrigeration units which would cause perishable items to spoil and of tampering with pins which couple a trailer to the tractor portion of a truck. If a driver pulled out without knowing that a trailer was effectively coupled to the tractor, Sutton testified, it could cause substantial damage to the trailer.

Because of these reports, Sutton said, management increased its supervision of the warehouse complex. There is no substantial evidence contradicting this testimony. Additionally, based upon my observations of Sutton while he testified, I find no reason to doubt this testimony which I credit. Sutton impressed me as a reliable witness, and I credit all of his testimony.

As previously noted, I do not take into account management's motivation for increasing the amount of supervision, but I do take into account the fact that management did increase the supervision as Sutton testified. Moreover, I do take into account whether the increased supervision reasonably would communicate to the employees any message pertaining to the union organizing drive and specifically whether it communicated a message which interfered with, restrained, or coerced employees in the exercise of their Section 7 rights.

Truck driver John Weeks testified that he saw more supervisors during the union organizing campaign. This

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testimony, of course, is consistent with Sutton's testimony that more supervisors were present because of the reports of vandalism and the need to prevent it.

Weeks also testified that on one occasion, he put pro-union handbills in one of the bathrooms at the Respondent's facility. After seeing a supervisor go in, he went back and discovered that the handbills were gone.

On one occasion Weeks also placed some pro-union handbills in the lounge. Weeks testified that after he left the lounge, he looked through a window and saw two supervisors, Bobby Sutton and Paul Siebenthal, in the lounge. Weeks' testimony does not persuade me that the Respondent either engaged in surveillance of the employees' union activities or created the impression that it was engaging in such surveillance.

To the contrary, Weeks' testimony about looking through the lounge window suggested that it was just as likely that he was keeping the supervisors under surveillance as the other way around.

Weeks demeanor while testifying about this matter suggested that he drew some amusement from it, as he might from a game. However, as previously noted, the Board applies an objective standard of evaluation Section 8(a)(1) allegations. Therefore, Weeks' reaction does not compel a conclusion that other employees would not be coerced, just because Weeks did not have this reaction.

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Employee Chance Hull testified as a witness for the General Counsel. The Union's May 19, 1997, letter listed Hull among the 20 employees on the Union's organizing committee. According to Hull, during the organizing campaign, the supervisors stayed later than usual and, to quote Hull, "they followed us around everywhere we went."

Hull further testified that supervisors stayed in the smoking and break areas. On cross-examination, Hull admitted that he had heard that a number of drivers had complained that their units had been tampered with and that someone had turned up the thermostats on refrigeration units. I do not rely upon Hull's testimony in deciding whether or not there had been such complaints of vandalism, because Hull's testimony on this point would be hearsay and probably second- or third-hand hearsay.

However, Hull's testimony on this point is material, because in essence a Section 8(a)(1) violation consists of the communication of a coercive message in some manner. The message may be communicated either by words or by action. In this case, the complaint does not allege that Respondent made any statement which interfered with, restrained, or coerced employees in the exercise of Section 7 rights.

Instead, the Section 8(a)(1) allegation here alleges that Respondent interfered with, restrained, and coerced employees by increasing the number of supervisors and by supervising employees more closely, in other words, an action which would

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communicate a message to employees.

Since the Government has not alleged that the Company made any statement associating these actions with the union drive and since the record does not show that the Respondent ever made such a statement, any anti-union message contained in these actions must be an implied message rather than an explicit one. To determine whether employees would be likely to infer an anti-union message from their observations of increased supervision, it is necessary to look at the context of this event.

On the one hand, it appeared to coincide with the union campaign which might lead employees to associate the two. On the other hand, if employees also had received information that some drivers had reported incidents of vandalism, the sudden appearance of the extra supervisors would be less likely to convey a message relating the supervision to the Union's organizing drive.

For this reason, Hull's testimony that he heard that the Company had received reports of vandalism is relevant, and it is relevant whether or not the Company actually had received such reports of vandalism.

Another employee, Charles Fox, also testified that he observed increased supervision at the same time as the Union's organizing drive. Fox, who is also known as Gene Fox, is one of the 20 pro-union employees whom the Union identified in its May 19, 1997, letter to the Company.

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Fox described one occasion in which he believed supervisors followed him into a restroom. Fox's testimony did not convince me that he actually had been followed around for any substantial period of time by a supervisor, although it does raise the possibility that supervisors once came to look for him while he was in one of the stalls in the men's room. Even if they did, there is no evidence which would link their looking for Fox on this occasion with anything concerning the Union.

In this case, there was no collective bargaining agreement which limited the Respondent's use of supervisors to oversee the work. The Respondent had a right to use as many supervisors as it needed to accomplish its lawful objectives of seeing that the work was done and preventing vandalism.

Although the law prohibits an employer from using supervisors to engage in surveillance of employees' union activities, the evidence does not establish that the Respondent's supervisors engaged in such surveillance or created the impression of it. The fact that there were supervisors in the employee lounge might tend to make it a less likely site for discussions about the union, but it did not make their presence unlawful. Supervisors had a right to be in the lounge, just as did employees.

The fact that supervisors took down handbills posted on the employer's property also is not unlawful nor does the complaint allege it to be. The Union had no more right to post handbills

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on company walls than the Company would have to post them on the walls of the union hall.

Additionally, it may be noted that two witnesses testified that they had asked supervisors for copies of anti-union handbills the supervisors were distributing, and the supervisors refused to give them copies. The complaint does not allege that this conduct was violative, and I do not find it to be so.

In other respects, the evidence does not establish that the Respondent made any statement which associated the increased supervision with the union drive, and as noted, at least some employees were aware that the employer had received or purportedly had received reports of vandalism occurring, which provides a basis for additional supervisors being present that was unrelated to the union organizing drive.

In these circumstances and applying an objective standard, I find that the increase in supervisors did not violate Section 8(a)(1) of the Act. In other ways, I do not find that the allegations of paragraph 7 of the complaint have been established, and I recommend that it be dismissed.

In deciding the Section 8(a)(3) allegations raised by complaint paragraphs 8 and 10, I will consider first the case involving Ronald G. Hunt, one of the Respondent's drivers. On June 13, 1997, Hunt and another driver were in a truck, making a delivery to an Allsup's convenience store in Spur, Texas.

According to Cindy Campbell, who was then the store manager

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and then named Cindy Longoria, Hunt came into the store in a rude manner and began asking questions about a car which was blocking the path to the spot where the truck could be unloaded.

When Hunt learned that the driver of the car was in the restroom, he demanded several times that the store personnel get her out of the bathroom and have her move her car. He also stated that they, meaning the truck drivers, could turn the car into a compact car, presumably by running over it with the truck.

Campbell also testified that a little later, Hunt asked her and a store clerk which of them was going to help unload the truck, referring to the truck as a "son of a bitch" or a "sucker." According to Campbell, after Hunt left, several customers in the store commented on his rudeness, and she telephoned the Respondent to complain.

The dispatcher who received her complaint noted it, so that later in the day, the Respondent's transportation director, Bobby Sutton, became aware of the incident. He spoke with Campbell by telephone, and an investigative process began which led to Hunt's discharge. The employee termination form in evidence as Respondent's Exhibit 8.1 indicates that Hunt's last day worked was June 13, 1997, although he did not sign the form until June 23, 1997.

The reason given on the termination form was "rude, inappropriate, and offensive conduct at stockholder's location

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in the presence of store employees and customers, and failure to follow AFI delivery policy (leaving store before they could check in delivery)."

Hunt denied demanding that the store manager get the customer out of the ladies restroom to move her car and also denied asking the store personnel to help unload the truck. Instead, he testified that he asked them, "Which one of you has the honor of accompanying me outside."

He also testified that the assistant store manager signed the delivery form. Hunt's testimony also suggests that either customers were not present in the store or were not close enough to hear what was said.

However, Hunt did not deny making the statement about turning the customer's car into a compact car. I must therefore decide which witness to credit and will begin that analysis by looking at Hunt's testimony regarding turning the customer's car into a compact car.

The General Counsel's questions sought to characterize this statement, which Hunt admitted, as a joke. Hunt went along with this characterization, but his demeanor did not suggest that he was particularly convinced by it, and he did not appear particularly convincing.

On the other hand, Campbell was a convincing witness. I credit Campbell's testimony for two reasons. First, she is a totally independent witness who now works neither for the

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Respondent nor for one of its customers. By comparison, Hunt has a substantial interest in the outcome, because he stands to regain his job.

Second, Campbell's demeanor as a witness, particularly upon cross-examination by the Union, impressed me. The Union's counsel tried to get Campbell to admit she complained to Respondent about Hunt, not because she was offended by what Hunt did, but out of what might be called a bureaucratic "cover your actions" motivation. When Campbell disagreed, the cross-examining attorney persisted. Campbell's indignation apparent from her demeanor demonstrated that she considered herself to be the party abused by Hunt's action and that she did not believe that she had any need to justify or cover her own actions.

Therefore, her reaction to this persistent cross-examination, apparent in her demeanor, helped persuade me as to her reliability as a witness. Clearly, she regarded Hunt's conduct as brutish and offensive. She would not have had this reaction if Hunt had behaved as he claims. I credit Campbell.

In determining whether Hunt's discharge violated the Act, I applied the framework established in *Wright Line*, 251 NLRB 1083 (1980) enfd. 662 Fed. 2d 899, 1st Circuit (1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the General Counsel must first make a prima facie showing "sufficient to support the inference that protected conduct was a motivating factor in the employer's

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decision" to take the action which allegedly violated Section 8(a)(3).

Once the General Counsel has made such a showing, the burden then shifts to the employer "to demonstrate that the same action would have taken place even in the absence of the protected conduct." That's *Wright Line*, again, 251 NLRB at 1089. If the General Counsel does not present evidence establishing such a prima facie case, then the Respondent does not have to demonstrate that it would have taken the adverse employment action anyway.

The General Counsel may establish the prima facie case by proving the following four elements. First, the alleged discriminatee engaged in union or protected concerted activities. Second, the Respondent knew about such activity. Third, the Respondent took an adverse employment action against the alleged discriminatee. And, fourth, there is a link or nexus between the protected activities and the adverse employment action.

At the first step, the evidence establishes that Hunt engaged in considerable protected activity, including handing out union literature, talking to employees about the union, and wearing a union cap during his work. The Government has satisfied this step.

At the second step, the evidence also establishes that the Company knew about Hunt's union activity. The Union's May 19,

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1997, letter to the Company identifies Hunt as a member of the Union's organizing committee. The evidence, therefore, proves the second *Wright Line* requirement.

At the third step, the evidence establishes that the Company took an adverse employment action against Hunt. It discharged him. The General Counsel, therefore, has proven the first three *Wright Line* requirements.

However, I conclude that the Government has not proven the fourth requirement, that is, a link between Hunt's protected activity and the adverse action against him. Such a link may be established by proof that the Company, by acts or statements, has interfered with, restrained, or coerced employees in the exercise of Section 7 rights in violation of Section 8(a)(1) of the Act.

The complaint in this case alleges only one count of independent violation of Section 8(a)(1), and I have found that the evidence does not prove this allegation. In other respects, the Government does not allege and the evidence does not establish a violation of Section 8(a)(1).

The General Counsel contends that I may find the necessary link by looking at statements the Respondent has made about unions, even though the Government does not allege that these violated the law. These statements may be found in handbills issued by the Company in response to the union campaign and in the employee handbook, all of which are in evidence in this

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proceeding.

The Respondent contends, on the other hand, that the First Amendment bars consideration of its lawful statements to show motivation for its action. Such an interpretation, however, often would make it impossible to prove motive in many different kinds of cases. The First Amendment does not go that far. It prohibits Government from engaging in prior restraint of expression, but it does not prevent Government from considering that what a person says might mean something.

Although the First Amendment does not bar me from considering Respondent's lawful statements as evidence and motive, Section 8(c) of the National Labor Relations Act does have an effect upon the extent to which I may consider lawful statements which the Respondent has made.

Section 8(c) states, "The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of the Act, if such expression contains no threat of reprisal or force or promise of benefit."

I find that the statements in question do not contain any threat of reprisal or force or promise of benefit, and that they fall within the coverage of Section 8(c). However, the Board has stated that "conduct that may not be found violative of the Act may still be used to show anti-union animus," without

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transgressing Section 8(c). See *Gencorp,* 294 NLRB 717, footnote 1, 1989, citing *General Battery Corp,* 241 NLRB 1166 at 1169, 1979.

Therefore, I will consider the Respondent's lawful statements as to the issue of animus, but will do so in a manner consistent with the provisions of Section 8(c) and with the Board's doctrine as expressed in the *Gencorp* decision.

Considered in this manner, the Respondent's lawful statements do not establish the link required by the fourth step of the *Wright Line* framework. These statements expressed Respondent's opinion that unions were detrimental and the Respondent would take all lawful steps to oppose the Union at its facilities.

The Respondent never stated that it would do anything unlawful. If the Respondent had made other statements which violated the Act or if it had engaged in conduct which violated Section 8(a)(1), I would be less inclined to take seriously the Respondent's use of the word "lawful." However, there is no evidence that the Respondent made any statements which violated Section 8(a)(1). The complaint alleges only one count of independent violation of Section 8(a)(1), and I have found that the evidence does not establish this violation.

In this context, free of 8(a)(1) violations, I will not assume that Respondent's lawful words mean other than what they expressly say. The words are limited to opposing unionization

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in lawful ways. Considering these words in the manner allowed by Section 8(c) and the Board's policy expressed in *Gencorp,* I do not find that they establish the nexus required by step four of the *Wright Line* test.

The General Counsel also asserts that the timing of Hunt's discharge is sufficiently suspicious to support an inference of discriminatory motive. I do not agree. The Union's organizing drive had been going on for at least a month. Additionally, there does not appear to be any connection between any particular instance of Hunt engaging in protected activity and the decision to discharge him. Moreover, Hunt's last day of work was June 13, 1997, the same day as the incident in question.

In sum, I find that the General Counsel has not satisfied the fourth element of the *Wright Line* analysis with respect to Hunt's discharge, and therefore has not established a prima facie case. Therefore, I recommend that this allegation be dismissed.

Next I will discuss the discharges of employees John Weeks and Alphonse Buss. They are both truck drivers and were driving partners at the time of the material events.

On about June 3, 1997, they took a load from the warehouse in Amarillo for delivery at a Kelloff's store in Antonito, Colorado. Weeks was dissatisfied with this load at the time he left the Respondent's warehouse. He considered the trailer to

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have been loaded poorly and that the load was too large for the type of trailer used.

When he got to the store in Antonito, Weeks spoke to the assistant store manager, Jason Rendon, and encouraged Rendon to write a letter, complaining about the way the truck was loaded. Rendon did write a letter, which stated in pertinent part, "Today's truckload (truck number 11) was unsafe for drivers to unload. Load was put on a 48-foot trailer and should have been put on a 53- or 57-foot trailer. Things seemed intentionally loaded wrong. This kind of load holds the drivers up for us as well. I would appreciate it if this would not happen again."

Weeks also purchased a disposable camera while at the store, and in the presence of store personnel, photographed the inside of the trailer containing merchandise. Weeks later gave Rendon's letter, as well as a letter he had written, to management. However, Weeks did not give management the photographs he had taken.

Management received a complaint about this incident, and transportation director Sutton issued Weeks a written warning. Sutton also directed that Weeks and Buss should not return to the Kelloff's store. I credit Sutton's testimony, based upon my observations of the demeanor of the witnesses.

On a June 13, 1997, run, the same team, Weeks and Buss, did return to the store. They were not assigned to deliver any merchandise there. Weeks claimed to have been asleep at the

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time Buss pulled the truck into the store parking lot. Although Buss testified that he stopped to use the restroom, he also admitted that he saw assistant store manager Rendon and asked him, "What happened about the letter, Jason."

The Respondent learned about this incident and conducted an investigation which led to the discharge of Weeks and Buss. Employing the *Wright Line* analysis, I find that the General Counsel has satisfied the first three requirements. Weeks and Buss were active union supporters, identified as organizers by the Union's May 19, 1997, letter to the Company, and each was discharged, which was an adverse employment event.

However, the Government has not satisfied the fourth requirement of a link between the protected activities and the adverse actions. For the same reasons applicable to Hunt, discussed previously, a preponderance of the evidence does not establish unlawful motivation.

I do not find that the circumstances of the discharge or the reasons given by Respondent for them raised any indication of pretext. Respondent investigated the facts fully, but it had done likewise in earlier cases not involving union adherents or a union organizing drive.

I find that the General Counsel has not established a prima facie case, but even assuming such a case, I would find that Respondent has rebutted it with respect to all three alleged discriminatees.

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Respondent's customers are also its owners. The Union suggests that this relationship is less than arm's length, but the Government does not allege any alter ego or single-employer status, and I do not find that to be the case here.

However, considering the internal politics of associations in general, including in particular the cooperative association which owns the Respondent, I believe it is very likely that management officials considered themselves especially vulnerable because the same persons who had the power of the purse as customers also had the executive power by electing a board of directors which could replace the current managers with others.

Considering this fact, it is logical that Respondent would place a high premium of keeping good relations with its customers who were also its shareholders. Hunt's conduct obviously created an ugly and unprofessional image and cannot be defended.

Weeks' conduct also was unacceptable. He impressed me as deriving some pleasure from shaking things up, and I do not criticize that quality in any way because of the relationship between progress and challenging the status quo. Although I don't criticize the quality in any way, I do take it into consid-

eration in evaluating Weeks' conduct at the store and the way he went about this conduct.

Based upon my observations of Weeks, I find that when he went to the Colorado store and talked to Rendon, he did so

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rather dramatically. His taking photographs of the truck, as if to document a safety violation, was also done dramatically and certainly was intended to create a stir.

The Union argues that Weeks did these actions in part because of Weeks' support for the union. Perhaps he did, but I find that they were not activities which were protected by the National Labor Relations Act.

Moreover, it is clear from Rendon's subsequent letter to the Company, dated June 5, 1997, that when Weeks urged Rendon to write a letter and dictated its contents to Rendon, Weeks did not tell Rendon about the connection between the letter and the Union, if there were such a connection. In these circumstances Weeks was not engaged in any activity protected by the Act.

Additionally, I should note that I do not credit Weeks' testimony to the extent he denies dictating the letter to Rendon. The letter obviously refers to a truck-trailer in the terms a truck driver would use; for example, it talks about the length of the trailer. And in agreement with Rendon's later letter, I find that Weeks dictated much of Rendon's earlier letter to him.

As to Buss, the evidence establishes that Respondent had a reasonable basis to believe he was not candid in explaining why he stopped at the Kelloff's store after Sutton's order that they should not return. He claimed it was to visit the restroom, but the evidence shows he then talked to Rendon about the letter.

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Because of this apparent lack of candor, Respondent clearly would be reasonable in suspecting that Buss and Weeks were trying to reignite a controversy which involved one of Respondent's customers and shareholders and did so in violation of Sutton's orders.

The General Counsel and Union also contend that the Respondent may not rely upon hearsay evidence as a means of rebutting the Government's prima facie case. As noted, I do not find that a preponderance of the evidence establishes such a prima facie case. However, I also note that the law does not require a company to conduct an investigation before discharging an employee in a manner consistent with the Federal Rules of Evidence or even with the Administrative Procedures Act.

In fact, the law does not even give me authority to examine Respondent's investigative process to determine whether or not it was fair. I may look at it only to determine whether the Respondent's actions indicate the presence of an unlawful anti-union motive.

Respondent conducted a remarkably thorough investigation and did not act precipitously in discharging these three individuals. Moreover, the thoroughness of the investigation was in keeping with how it investigated incidents involving other employees before discharging them. Therefore, I do not find that the investigative process itself indicated any unlawful motivation.

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Respondent was entitled to place a high value on its relationship with its customers and shareholders, and to insist that drivers followed the prescribed procedures for dealing with them. These procedures included having customers telephone the home office, using the WATS line for that purpose, to deal with problems.

Although the Union suggests that the problems that Weeks had with the truck were not the sort of problems that could be handled with a telephone call, that argument goes to the soundness of the rule and not to the Respondent's right to enforce it.

In sum, I find that the General Counsel has not established a prima facie case with respect to the discharges of these individuals, but even assuming that the evidence established such a case, the Respondent has demonstrated that it would have taken the same action against Hunt, Weeks, and Buss, even in the absence of protected activity.

Therefore, I recommend that the complaint be dismissed in its entirety.

As soon as I receive the transcript of this proceeding, I will issue a certification. Upon transfer of the case to the Board, the parties will be notified, and their time for appeal will begin.

Finally, I would like to add quite sincerely that I have been extremely impressed with the courtesy and the

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professionalism of all counsel in this case, as well as with the legal quality of their presentations and their representation. It has truly been a pleasure, working with such able attorneys, and I appreciate it.

The hearing is closed.